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No. 170

IN THE

Supreme Court of the United States

October Term—1954

No. 14,673

CHARLIE SULLI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

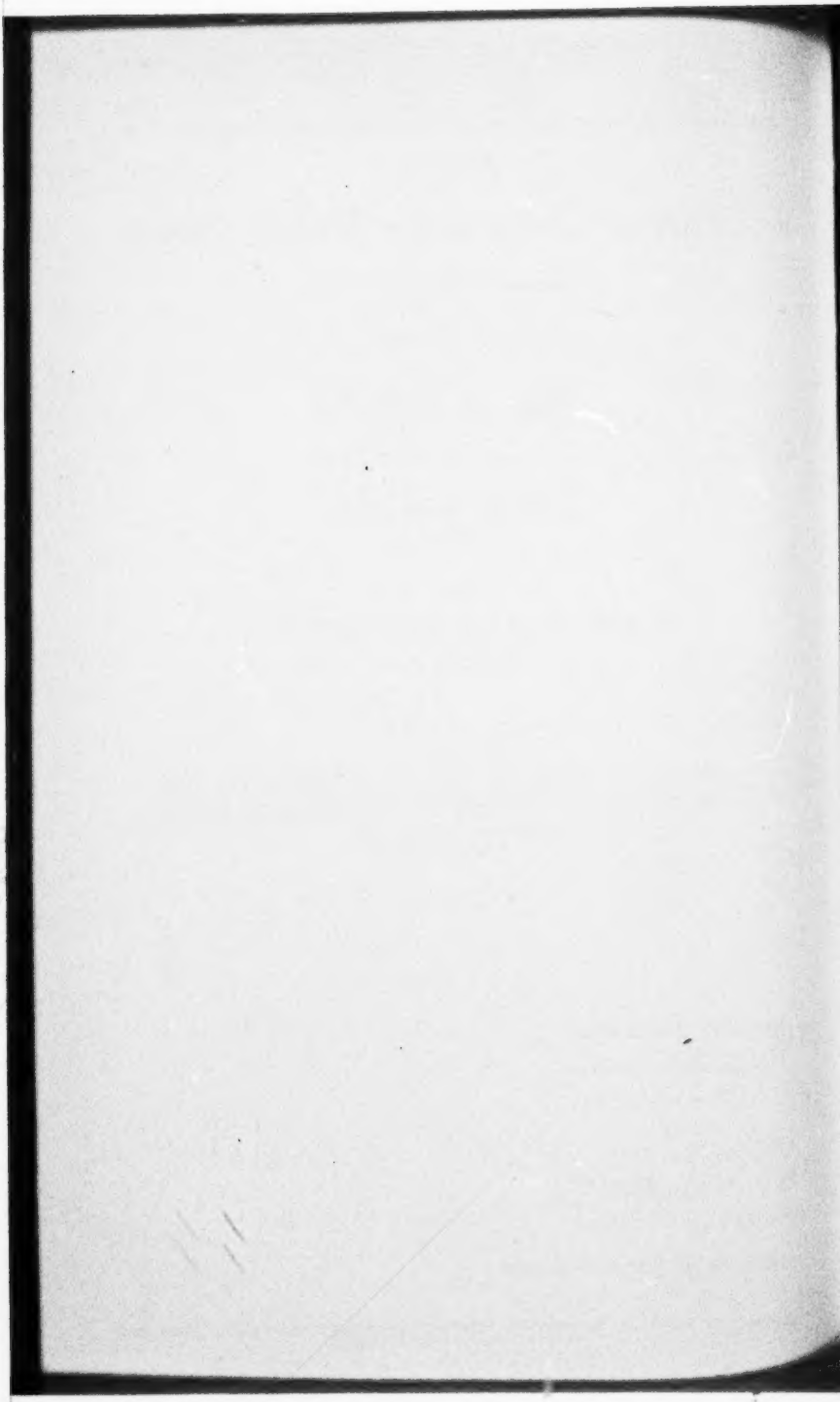
PETITION FOR WRIT OF CERTIORARI TO THE UNITED SATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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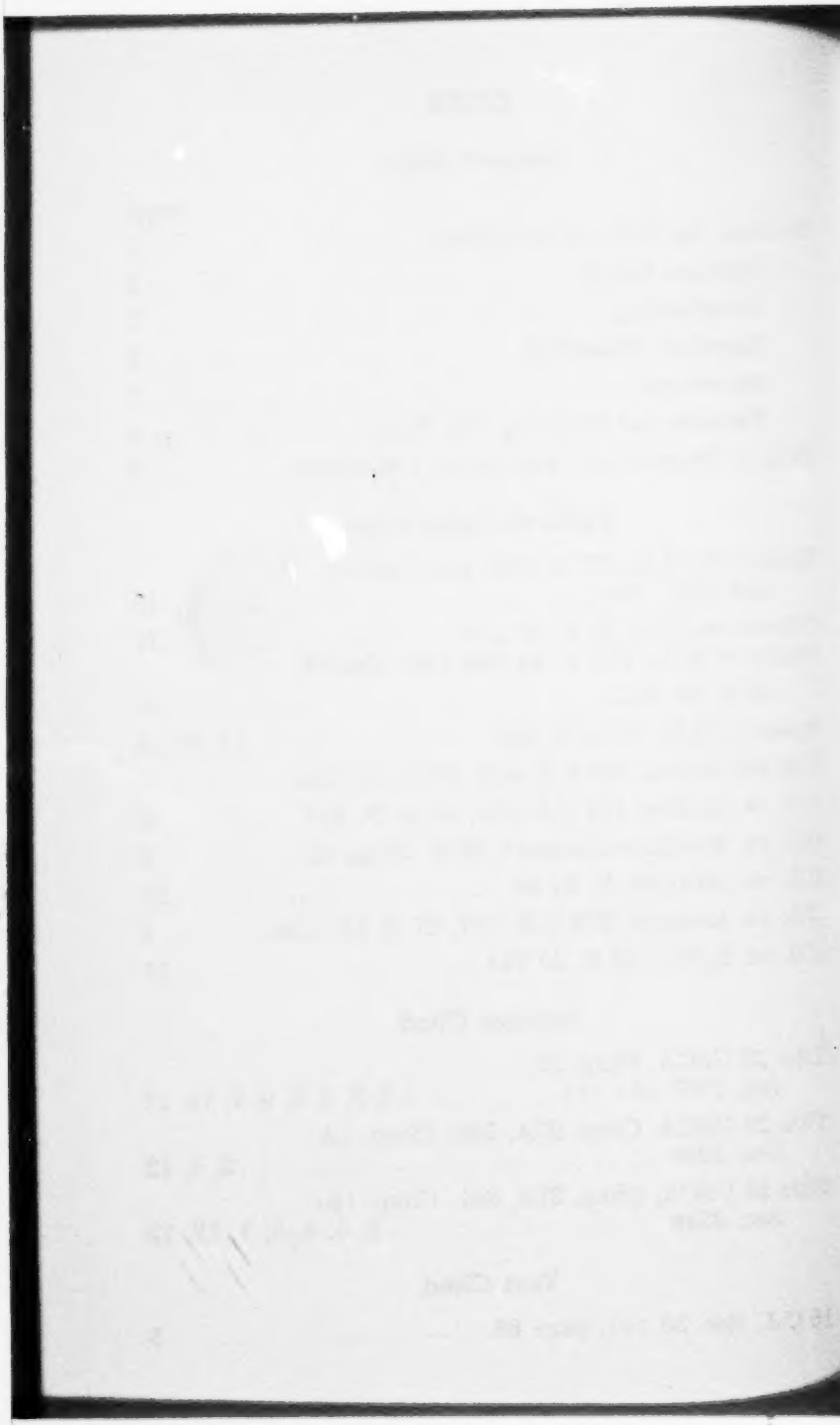
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IN THE

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No. 14,673

CHARLIE SULLI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED SATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on May 11, 1954.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears on page 93 of the Transcript of Record. An order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing was filed on June 4, 1954 (R. 103).

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1), this being a case where an important question of federal law has not been, but should be, settled by this Court. On March 9, 1953, a criminal Information was filed in the United States District Court for the Southern District of Florida, charging the petitioner, Charlie Sulli, with a violation of certain Internal Revenue Laws. The criminal Information, which contained but one count, charged that during the month of January, 1953, the petitioner was engaged in the business of accepting wagers in Tampa, Hillsborough County, Florida, as defined in Section 3285 (b) (1) (c) and (2), Title 26, United States Code, and that he wilfully and unlawfully failed to register and pay the special tax required by law in violation of Sections 2707, 3285, 3290, 3291, and 3294, Title 26, United States Code (R. 1, 2). On June 16, 1953, the petitioner was duly tried in the United States District Court for the Southern District of Florida, and on the same day the jury returned a verdict finding the petitioner guilty as charged in the Information (R. 79). On the 15th day of July, 1953 the Honorable William J. Barker, United States District Judge for the Southern District of Florida, sentenced the petitioner to serve a period of one year imprisonment and ordered that the petitioner pay a fine in the sum of $2000.00 to the United States of America (R. 82,83). The judgment of the trial court was affirmed by the United States Court of Appeals for the Fifth Circuit on May 11, 1954 (R. 96). On June 4, 1954 the Court of Appeals denied the petition for rehearing (R. 103).

The constitutionality of Section 3294 of Chapter 27-A, Sub-chapter B, Title 26, U.S.C.A. upon which review is here sought was timely raised in the trial court by the petitioner on April 20, 1953, by his motion to dismiss (R. 5, 7, 8); upon motion for a new trial (R. 80); upon appeal, particularly Ground 8 (R. 88); and by a petition for rehearing (R. 97-102).

QUESITION PRESENTED

Are the penalties, as prescribed by Section 3294 of Chapter 27-A, Sub-chapter B, Title 26, U.S.C.A., so uncertain, vague and indefinite as to render this section inoperative and unconstitutional?

STATEMENT

On March 9, 1953, a criminal Information was filed in the United States District Court for the Southern District of Florida, charging the petitioner with a violation of certain Internal Revenue Laws (R. 1, 2). The criminal Information purported to charge a violation of Section 3285, Title 26, U.S.C. commonly referred to as the "Gambling Stamp Act." On April 20, 1953, the petitioner filed his motion to dismiss the Information wherein he contended, inter alia, that Sub-section (C) of Section 3294, Title 26, U.S.C.A. is unconstitutional and void in that it purports to prescribe penalties for the violation of Section 3294, Title 26, U.S.C.A. by merely adopting Section 2707; that said Section 2707 consists of three distinct subdivisions and creates separate, distinct offenses, some of which offenses are felonies and some misdemeanors, and all of the penalalties imposed by Section 2707 under the sub-divisions thereof are different and, therefore, said Sub-section of 3294 leaves so indefinite and uncertain the penalties attempted to be provided therein and thereby that the

same is invalid, inoperative and void (R. 5, 7, 8). Said motion came on to be heard before the Honorable William J. Barker, District Judge, on April 24, 1953, and was on the same day denied (R. 9). The same question was raised by the petitioner on June 19, 1953, in his motion for a new trial (R. 80, 81), and on July 15, 1953, the said motion was denied by the trial court (R. 81, 82). The same question was also presented to the United States Court of Appeals for the Fifth Circuit by point 8 of petitioner's Grounds of Appeal (R. 88), and again by a petition for rehearing (R. 97-102).

REASONS FOR GRANTING THE WRIT

The constitutionality of Section 3294 of Chapter 27-A, Sub-chapter B, Title 26, U.S.C.A., is an important question of the laws of the United States of America which has not been, but should be, settled by this Court. This is particularly true in view of the fact that so many persons throughout the United States are being charged and prosecuted for violations of Section 3285 (b) (1) (c), (2), Title 26, U.S.C.A., and of Sections 2707, 3285, 3290, 3291, and 3294, Title 26, U.S.C.A., and after being convicted the trial courts are confronted with a penalty provision from which they have a choice of three different types of penalties, some being misdemeanors and some felonies.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This case concerns the constitutionality of Section 3294 of Chapter 27-A, Sub-chapter B, Title 26, United States Code. Section 3294, Title 26, United States Code, provides the penalties for violations of the Act; sub-section (a) provides that any person who does any act which makes him liable for special tax under this sub-chapter, without having paid such tax, shall, besides being liable for the payment of the tax, be fined not less than $1,000, and not more than $5,000. Sub-section (b) provides penalties for failure to post and exhibit the stamp of $50 and costs of prosecution, or any person who, through negligence or refusal, fails to comply with Section 3293 shall be liable to a penalty of $100 and the costs of prosecution, and sub-section (c) provides for "Wilfull" violations and prescribes no penalties, but refers to Section 2707, which prescribes penalties for violations of Section 2700.

It will be noted that neither sub-sections (a) nor (b) of Section 3294 provides for any imprisonment. Therefore it had to be under sub-division (c) that the trial court bottomed its judgment in sentencing the petitioner to one year imprisonment. The petitioner attacked this sub-section in his motion to dismiss (R. 5, 7, 8). The Information purported to charge the petitioner with wilfully failing to register and mentioned Section 3294 (R. 1, 2). The only provision of said section dealing with wilful violations is subsection (c). So the petitioner, by his motion to dismiss, by grounds 10, 11, 12 and 13, (R. 7, 8) attacked this sub-section as being inoperative, invalid and void because of uncertainty, vagueness and indefiniteness. This petitioner renewed this attack in his motion for new trial (R.

80); by ground 8 of his statement of points on which he intended to rely on appeal (R. 88); and again in his petition for rehearing (R. 97-102).

Now Section 2707, in providing the penalties, is divided into 3 sub-sections and prescribe different penalties, some being misdemeanors and some felonies.

Sub-section (a) of 2707 provides penalties for any person who wilfully fails to pay, collect, or truthfully account for and pay over the tax imposed by Section 2700 (a), or wilfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this sub-section for any offense for which a penalty may be assessed under authority of Section 3612.

Sub-section (b) provides any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purpose of the computation, assessment, or collection of any tax imposed by this subchapter who wilfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

Sub-section (c) provides that any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

So, it will be seen that sub-section (c) of 3294, which merely provides that the penalties prescribed by Section 2707 with respect to the tax imposed by Section 2700 shall apply with respect to the tax imposed by this subchapter, in fact does not provide any definite penalty or punishment at all for the reason that Section 2707 prescribes three different types of punishments, some felonies and some misdemeanors. The punishment provided by law cannot be left in such a state of uncertainty. The punishment prescribed must be definite and not left to the discretion of the court to adopt one type of punishment at the trial of one case, and an entirely different form of punishment upon the trial of another like case. If this statute is sustained not only can the trial court determine that on a charge brought against one defendant he will impose one type of punishment, but also he will treat it as a misdemeanor in one case and a felony in another. The courts uniformly hold that a statute such as here is void for uncertainty. Therefore, the judgment in this case, being bottomed upon this sub-section, is void. The only other penalties prescribed by Section 3294 are as prescribed by sub-sections (a)

and (b) and provide for fines only and the court has no power or authority to order imprisonment or confinement.

16 Corpus Juris 68, Section 30:

"Necessity for Prescribing Penalty. It has been held in some of the cases that where an act is a crime solely by statute, and no penalty is prescribed in the statute, an indictment will be quashed, or a judgment arrested; or in other words, that a description, definition, and denouncement of acts necessary to constitute a crime do not make the commission of such act or acts a crime unless a punishment is annexed, for punishment is as necessary to constitute a crime as its exact definition. . . ."

United States vs. Resnick, et al. 299 U. S. 207; 57 S. Ct. 126:

"Statutes creating crimes are to be strictly construed in favor of accused, and may not be held to extend to cases not covered by words used."

United States vs. Martinez-Gonzalez, 89 Fed. Supp. 62:

"It is the punishment prescribed which makes an act a crime, not a mere interdiction of conduct without punishment. There is no better illustration of this principle than the opinion of the Supreme Court in U. S. vs. Evans case, 333 U. S. 483, 68 S. Ct. 634, 92 L. Ed. 823, where the court held in constructing this identical section, that the harboring or concealing of an alien was not a crime because no punishment was prescribed for that conduct. Under the Section there is not a general punishment for the act of bringing in or attempting to bring in aliens, as pointed out, but a separate mandatory punishment is required to be imposed on a defendant for each alien brought in or attempted

to be brought in. Therefore, such conduct is a seperate crime with separate punishment as to each alien and must be separately charged in different counts of an indictment. This conclusion is further substantiated by the language of the Statute where the act of bringing or attempting to bring in an alien is confined only to 'any alien' in the singular and there is no reference to aliens in the plural such as 'any alien or aliens.' . . ."

United States vs. Lacher, 134 U. S. 624, 10 S. Ct. 626:

"There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute."

United States vs. Evans, 333 U. S. 483, 68 S. Ct. 634:

". . . The Government in effect concedes that in the terms the section prescribes no penalty for concealing or harboring. But it argues that inclusion of them as offenses becomes meaningless unless the penalty provision,in spite of its wording, is construed to apply to them as well as to bringing in or landing. In other words, because Congress intended to authorize punishment, but failed to do so, probably as a result of oversight, we should plug the hole in the statute.

"It is possible that Congress may have intended this. But for more than one reason *we cannot be sure of that fact.*

"We are not willing to undertake extension of the penalty provision blindfold, without knowing in advance to what acts the penalties may be applied. Nor are we any more willing to decide wholesale among the various possibilities of coverages.

> *"We agree that Congress meant to make criminal and to punish acts of concealing or harboring.* But we do not know, we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply.
>
> *"This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its functions, to revise the statute than for us to guess at the revision it would make. We could do no more than make speculation law."*

Smith vs. United States, 145 F. 2d 643, the Circuit Court of Appeals, 10th Circuit, said:

> "A criminal statute must be definite and certain in respect to the punishment it is intending to impose. Holmes vs. United States, 5th Circuit, 267 F. 529, Haas vs. Jennings, 120 O. St. 370, 166 N.E. 357, Ex Parte Ellsworth, 165 Cal. 677, 133 P. 272, People vs. McNulty, 93 Cal. 427, 26 P. 597, 29 P. 61. And a statute which, by reference to another, leaves the sentencing court in doubt as to the punishment it may impose for the described offense, is void and inoperative. . . ."

This direct question was presented in the case of *Holmes et al vs. United States,* 267 Fed. 529, text 531, and the United States Court of Appeals for the Fifth Circuit, in construing a section of the penal code, which referred to the preceding section for the definition of the punishment, prescribed, held:

> ". . . It is undoubtedly the law that a valid criminal statute should be certain in its terms, and not leave uncertain the acts intended to be prohibited or the punishment to be inflicted thereunder. *The punishment* in the event of conviction *must be as certain as any other provision of the statute. 16 C. J. 68.* In the instant case who can

say what punishment the lawmakers intended? The section itself is silent as to that punishment, and refers us to section 35 to ascertain it. When we look at the last named section, we find two punishments prescribed of very different severity: 'One, a fine of not more than $5000 or imprisonment of five years, or both' and the other a fine of not more than $500 and imprisonment of not more than two years. It is [redacted] contended that the lesser punishment must have been intended, because the subject matter of the last portion of the section is germane to the subject treated of in Section 36. But this contention is in our judgment untenable. *In a criminal statuate the citizen must not be left in uncertainty or to speculation or argument as to what acts constitute a violation, or what punishment, if any, is visited upon a violation when the terms are definite. . . .*" (Italics supplied).

In affirming the judgment of the trial court the United States Court of Appeals for the Fifth Circuit relied strongly upon the case of *Spies vs. United States,* 317 U.S. 492. In the *Spies Case, supra,* the only question before the Court was in connection with the judge's charge in the trial court, which followed the interpretation put upon Section 145 (b), 26 U.S.C.A. Int. Rev. Code, in *O'Brien vs. United States,* 7th Cir., 51 F. 2nd 193, which that Court of Appeals followed in *United States vs. Miro,* 60 F. 2d 58. In the *Spies Case* the defendant was indicted for attempting to defeat and evade an income tax under Section 145 (b), Title 26, U.S.C.A. Int. Rev. Code. See *United States vs. Spies,* 128 F. 2d 743. In other words, the defendant was specifically charged with violating Section 145 (b), which makes a wilful attempt in any manner to evade or defeat any tax imposed by that title (chapter) or the payment thereof, a felony. The defendant in that case was not indicted for either misdemeanor. The indictment con-

tained a single count setting forth the felony charge of wifully attempting to defeat and evade the tax, and recited wilful failure to file a return and wilful failure to pay the tax as a means to the felonious end.

In the *Spies Case* the Court had no choice of penalties which it could have imposed upon the defendant. Whereas, in the case at Bar the petitioner is charged in the Information with a wilful violation of Sections 2707, 3285, 3290, 3291 and 3294, Title 26, United States Code. Section 3294, Title 26, United States Code, provides the penalties for violations of the Act; sub-section (a) provides that any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable for the payment of the tax, be fined not less than $1000, and not more than $5000. Sub-section (b) provides penalties for failure to post and exhibit the stamp of $50 and costs of prosecution, or any person who, through negligence or refusal, fails to comply with Section 3293 shall be liable to a penalty of $100 and the costs of prosecution, and sub-section (c) provides for "Wilful" violations and prescribes no penalties, but refers to Section 2707, which prescribes penalties for violations of Sections 2700.

It will be noted that neither sub-sections (a) nor (b) of Section 3294 provides any imprisonment. Therefore it had to be under sub-section (c) that the Court bottomed its judgment in sentencing the petitioner to one year imprisonment. Section 2707, in providing the penalties, is divided into 3 sub-sections and prescribes different penalties, some being misdemeanors and some felonies.

So, it will be seen that in the *Spies Case* the *Court had no choice of penalties* (the defendant having been specifically indicted for violating Section 145 (b), Title 26, U.S.C.A. Int. Rev. Code) which could have been imposed upon the defendant, and in the case at Bar the *Court had a choice of 3 different types of penalties.* For the foregoing reasons we respectfully submit that *Spies vs. United States,* supra, is not controlling in the instant case.

How can it be determined what particular subsection of Section 2707 Congress intended to adopt as the punishment. It would be but guess-work to say that the Congress adopted and prescribed one of said sub-sections of Section 2707 as against the other two. No definite punishment is, therefore, provided by subsection (c) of Section 3294, and under this condition the only penalties legally provided are those contained in sub-sections (a) and (b) of Section 3294, which provide for fines only without any authority of the court to order imprisonment. Under this condition, the judgment and sentence imposed in this case ordering the petitioner confined for a period of 12 months in prison is void because there is no valid statute authorizing the imposition of such imprisonment.

Petitioner now respectfully prays that a Writ of Certiorari be directed to the United States Court of Appeals for the Fifth Circuit, in order that the errors complained of may be reviewed and corrected.

This _____ day of June, A.D. 1954.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 170

CHARLIE SULLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 92-93) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1954, and a petition for rehearing was denied on June 4, 1954 (R. 94-101). The petition for a writ of certiorari was filed on June 25, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37 (b) (2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether 26 U. S. C. 3294(c) is unconstitutionally void for vagueness in that the penalty for willful failure to register and pay the special wagering tax is fixed by reference to 26 U. S. C. 2707.

STATUTES INVOLVED

26 U. S. C. 3294, 65 Stat. 531, provides:

(a) Failure to pay tax.

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

(b) Failure to post or exhibit stamp.

Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.

(c) Willful violations.

The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

26 U. S. C. 2707, 53 Stat. 290, provides:

(a) Any person who willfully fails to pay, collect, or truthfully account for and pay over

the tax imposed by section 2700 (a), or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subsection for any offense for which a penalty may be assessed under authority of section 3612.

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or

defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

Petitioner was charged in a criminal information in the United States District Court for the Southern District of Florida with violation of 26 U. S. C. 2707, 3285, 3290, 3291, and 3294 for having willfully and unlawfully failed to register and pay the special tax required of persons engaged in the business of accepting wagers as defined in 26 U. S. C. 3285 (b)(1)(C) and (2) (R. 1-2). A jury trial resulted in his conviction (R. 79), and he was sentenced to imprisonment for one year and a $2,000 fine (R. 82-83). On appeal (R. 83-84), the judgment was unanimously affirmed (R. 94).

In his motion to dismiss in the trial court (R. 7-8), on his appeal (R. 88, 93), and in his petition for rehearing (R. 97-99), petitioner attacked the constitutionality of 26 U. S. C. 3294 (c) on the ground of vagueness, a contention which he renews in this Court.

ARGUMENT

The statute which petitioner challenges for vagueness, 26 U. S. C. 3294 (c), provides that the penalties prescribed by Section 2707 with respect to the tax imposed by Section 2700 shall apply with

respect to the special wagering tax which, it is charged in the information, petitioner willfully failed to pay.[1] As the court below held in *Contreras* v. *United States,* 213 F. 2d 96, such incorporation by reference does not result in unconstitutional vagueness. It is not uncommon to have one statute create an offense and another provide for its punishment. Cf. *Palmer* v. *Lenovitz,* 35 App. D. C. 303, 306; *Andreas* v. *Clark,* 71 F. 2d 908, 909 (C. A. 9), certiorari denied, 293 U. S. 555. It is not, as petitioner claims, difficult to ascertain which subsection of Section 2707 applies to an offense under Section 3294 (a). Subsection (a) of Section 2707 obviously has no application since it merely provides for a penalty to be assessed and collected in the same manner as taxes. The crimes of willfully failing to pay a tax, make returns, keep records, or supply information, made punishable as a misdemeanor by subsection (b) of Section 2707, are obviously very different from the crimes of willfully failing to collect or account for a tax, made punishable as a felony by subsection (c) of Section 2707. The only possibility of interrelation is between the crime of willful failure to pay defined by subsection (b) and that part of subsection (c) which also punishes as a felony a willful attempt to evade or defeat a tax. However, as this Court pointed out in *Spies* v. *United States,* 317 U. S. 492, in differentiating between substantially similar felony and misdemeanor income tax provisions, the concept of an

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[1] Petitioner attacks only the validity of his one year prison sentence, not the $2,000 fine, apparently on the theory that the fine was authorized under Section 3294 (a).

attempt to evade or defeat includes "some willful commission in addition to the willful omissions that make up the list of misdemeanors." In this case petitioner was charged merely with willful omission, the indictment charging that he "did wilfully and unlawfully fail to register and pay the special tax * * *" (R. 2). Thus, it is clear that the only applicable penalty provision was subsection (b) of Section 2707.[2]

CONCLUSION

The decision below is clearly correct and presents no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY 1954.

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[2] *Holmes* v. *United States*, 267 Fed. 529 (C.A. 5), certiorari denied, 254 U.S. 640, and *Smith* v. *United States*, 145 F. 2d 643 (C.A. 10), certiorari denied, 323 U.S. 803, are not controlling since—unlike the situation in the instant case—the void Section 36 of the Criminal Code left the sentencing court in doubt as to the punishment it might impose for the proscribed offense.

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